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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S CLOSING BRIEF

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SUBJECT INDEX

	Page
Argument	1
Due Process Does Not Mandate a Transfer Hearing Prior to Adjudication of Delinquency	1
A. A Mandatory Preliminary Hearing Procedure Will Only Add to the Congestion of an Already Overburdened Juvenile Court	2
B. There Is No Denial of Due Process Inherent in a Juvenile's Having to Choose Whether or Not to Present a Defense During Delinquency Proceedings Held Prior to Transfer	5
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Gault, In re, 387 U.S. 1 (1967) 1, 2
Kent v. United States, 383 U.S. 541 (1966) 3
McKeiver v. Pennsylvania, 403 U.S. 528 (1971) ..1, 2
Winship, In re, 397 U.S. 358 (1970) 1, 2

Statutes

California Welfare & Institutions Code, Sec. 1769 5
California Welfare & Institutions Code, Sec. 1800 5

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ARGUMENT

Due Process Does Not Mandate a Transfer Hearing Prior to Adjudication of Delinquency

Although the issue in this case is the nature of due process to be accorded respondent Jones as an adult criminal defendant, the mode of analysis employed in the *Gault-Winship-McKeiver** trilogy is relevant here because of the significant collateral effect this case could have on the future operations of the juvenile court if double jeopardy were held to bar post-adjudication transfers such as occurred in this case. The *Gault-*

**In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

//

Winship-McKeiver mode of analysis serves to fortify the conclusion that application of the principle of continuing jeopardy to post-adjudication transfers is fully consistent with fundamental fairness. Additionally, this mode of analysis indicates that the burden on the juvenile court in terms of the additional hearings and reduced flexibility would militate against the application of the double jeopardy sanction even if the continuing jeopardy principle did not except this case from the operation of double jeopardy.

Respondent Jones misconceives petitioner's basic point when he asserts that petitioner's reliance on *McKeiver* is somehow misplaced because of petitioner's argument that the *Gault-Winship-McKeiver* trilogy is not directly germane to the resolution of the issue raised in this case. (Resp. Br. p. 10.) Petitioner's point, however, is that the determination of the content of due process with respect to the application of double jeopardy at respondent's adult criminal trial cannot be made in isolation. There will be an effect on the juvenile court system, and that effect should be weighed in the due process balance.

A. A Mandatory Preliminary Hearing Procedure Will Only Add to the Congestion of an Already Overburdened Juvenile Court

Both parties are in agreement that, if double jeopardy were held to bar a post-adjudication transfer of a minor from juvenile court to adult court, this determination would constitutionally mandate that the issue of transfer be conclusively determined prior to the adjudication of delinquency. Such a constitutionally mandated procedure would produce serious repercussions for the juvenile court.

It must be acknowledged that a preliminary hearing on the issue of transfer may be appropriate in some cases. Petitioner's point is that it is clearly not appropriate for *all* cases. The cases where it is not appropriate are those cases in which the minor is alleged to have committed one of the more serious felonies, such as murder or robbery. The criteria for transfer include many of the same factual matters that will normally be adduced at the delinquency adjudication hearing. (*See* Petn. Op. Br. p. 43.) If the juvenile court judge thoroughly considers the circumstances and details surrounding the crime and the minor's degree of sophistication in deciding whether to transfer or not, he will hear essentially the same evidence later to be reheard on the issue of guilt or innocence at the delinquency adjudication hearing. Under these circumstances, the two hearings will duplicate one another. By treating transfer as a dispositional alternative, the judge in this case avoided such duplication.

Although lengthy and duplicative hearings will not necessarily be the result in every juvenile court case where transfer is determined at the outset, there is every reason to believe that juveniles charged with serious felonies will demand and receive full-blown, adversary hearings on all of the factors relevant to transfer. Otherwise these hearings will fail to satisfy due process insofar as *Kent v. United States*, 383 U.S. 541 (1966) sets the standard by requiring a full and fair hearing before transfer. One would have to assume, as respondent does, that transfer hearings will always be summary, *pro forma* affairs in order to conclude that there will be no great additional burden on the juvenile court system from the imposition of mandatory preliminary transfer hearings. (*See* Resp. Br. pp. 32-35.)

Respondent Jones asserts that "As any seasoned trial judge knows, a full-blown trial takes far more time than a hearing which is concerned with sentencing or disposition." (Resp. Br. p. 35.) A principal reason why a sentencing hearing is ordinarily shorter is that the judge has had an opportunity to appraise the circumstances surrounding the commission of the crime and the defendant's degree of involvement during the course of the trial. When he has his observations from the trial to draw upon at the time of sentencing, there is no need for an extended hearing to go over ground already covered. In the same way, the transfer hearing in the instant case could be relatively brief when held after the conclusion of the adjudicatory hearing. When the transfer hearing is held before the adjudicatory hearing, however, the judge cannot fall back on any background gained at a prior hearing. He must obtain the background information he needs from the evidence presented at the preliminary transfer hearing, and this process will always consume more time because the judge will not have heard any of the evidence previously.

Not only will preliminary hearings in serious felony cases tend to take up more time, but they will also require a different judge for the transfer and adjudication hearings in each case where the juvenile court decides against transfer. Respondent concedes that this burden is a real one. (Resp. Br. pp. 35-37.) He offers no suggestion as to how this administrative nightmare might be mitigated.

Respondent also argues that more minors will be likely to admit their guilt, and thus avoid the need for a delinquency adjudication, if a final decision on transfer is made prior to the adjudication hearing. (Resp.

Br. pp. 23, 39.) This assertion is wholly speculative and chimerical. Common sense suggests that a juvenile charged with conduct amounting to a serious felony is not going to be any more likely to admit his guilt just because the possibility of transfer has been removed from the case. After all, such a youthful offender still faces the possibility that the juvenile court may commit him to the California Youth Authority for a period that may not end with his 21st birthday. Cal. Welf. & Inst. Code §§ 1769, 1800.

B. There Is No Denial of Due Process Inherent in a Juvenile's Having to Choose Whether or Not to Present a Defense During Delinquency Proceedings Held Prior to Transfer

Respondent Jones contends that the possibility of transfer after the delinquency adjudication either "chills" the presentation of an effective defense or permits the prosecution to preview his defense—a Hobson's choice. (Resp. Br. pp. 4-27.) The fallacy of this argument is obvious. This dilemma will not be removed by mandating that all transfer hearings must precede the adjudication of delinquency. To resist transfer at a preliminary hearing, the juvenile will still have to preview his defense if he attempts to show that the circumstances of the crime or his degree of involvement are such as not to warrant transfer. Indeed, in every case where the principle of "continuing jeopardy" has been applied to permit a retrial after appeal, the defendant has previewed his defense. Yet there is no violation of due process in these cases.

Moreover, in this case respondent Jones claims that he:

> ". . . was unaware at the time of the arrest that he would face a criminal prosecution. Indeed, the

> underlying assumption of both Jones and his counsel was that he would be tried as a juvenile and if convicted, treated as a ward of the juvenile court." (Resp. Br. p. 21.)

If this assertion in the brief is accurate, then the possibility of adult proceedings exerted no "chill" whatsoever on the exercise of his right to testify in his own behalf or to present a defense. Moreover, in this case, respondent Jones did testify at the adjudicatory hearing on the issue of delinquency held in juvenile court. (App. p. 18.) That testimony was *not* used against him in the criminal court proceedings which led to his armed robbery conviction. (*See* App. pp. 48-60.)

Conclusion

For the reasons expressed in both of petitioner's briefs, petitioner urges that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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